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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 680

WINN C. HAMRICK, as Trustee of the Residuary Estate for the use of the net income therefrom for relief of animals coming under the care of the Indianapolis Humane Society of the City of Indianapolis, Indiana, under the will of MARY POWELL CRUME, deceased,

Petitioner,

v.

INDIANAPOLIS HUMANE SOCIETY, INC., a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
I. Questions Presented	1–2
II. Statement of the Case	2–4
III. Argument	5–13
1. Petitioner's Alleged Claim Accrued in 1940, Eighteen Years Before the Complaint Was Filed	5–6
2. The Statutes of Limitation Commenced Running in 1940 When, According to Petitioner's Theory of the Case, Respondent's Possession of the Property Was Wrongful	6–7
3. Petitioner Could Not Indefinitely Suspend the Statutes of Limitation by Delaying His Own Performance, Therefore the Statutes Had Run Before His Suit Was Filed	7–8
4. The Statutes of Limitation Ran Before Petitioner's Action Was Filed Because of Petitioner's Unquestioned Failure to Make Demand for Return of the Property Within the Statutory Periods	8–9
5. Petitioner Did Not Have Capacity To Sue	9
6. The Decision of the Court of Appeals Does Not Conflict With Ohio Law	10
7. The Decision of the Court of Appeals Did Not Deny Full Faith and Credit to Ohio Judicial Proceedings	10–11
8. Even Should This Court Decide Any of the Questions Presented Adversely to Respondent, There Are No Special and Important Reasons Which Suggest Such Questions Should Be Decided by This Court	11–13
IV. Conclusion	13–14

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I. QUESTIONS PRESENTED

Respondent is dissatisfied with petitioner's statement of the questions presented, therefore those questions are restated below.

1. Did petitioner's alleged claim accrue in 1940 when respondent failed to seek appointment as trustee (as respondent contends) or did it accrue in 1957 when petitioner

obtained his purported appointment as trustee (as petitioner contends)?

2. Did the statutes of limitation commence running in 1940 when, according to petitioner's theory of the case, respondent's possession of the property was wrongful (as respondent contends), or at a later date, 1958, when petitioner obtained the purported court order permitting him to attempt to effect recovery of the property (as petitioner contends)?

3. Could petitioner indefinitely suspend the statutes of limitation by delaying his own performance (which respondent denies)?

4. Had the statutes of limitation run because of petitioner's unquestioned failure to make demand for return of the property within the periods of the statutes of limitation (as respondent contends)?

5. Did petitioner have capacity to sue (which respondent denies)?

6. Did the decision of the Court of Appeals conflict with Ohio law (as petitioner contends)?

7. Did the decision of the Court of Appeals deny full faith and credit to Ohio judicial proceedings (as petitioner contends)?

8. In the event this Court should decide any of the above questions adversely to respondent, are there any special and important reasons which suggest such questions should be decided by this Court (which respondent denies)?

II. STATEMENT OF THE CASE

Petitioner appealed to the Court of Appeals from a District Court order sustaining respondent's motion to dismiss

petitioner's complaint. That motion was based on two grounds: (1) expiration of statutes of limitation or (2) petitioner's lack of capacity to sue.

The facts which appeared on the face of the complaint relating to the statutes of limitation defense were these: Respondent was appointed residuary trustee under the will of Mary Powell Crume to hold the trust corpus for the relief of animals coming under respondent's care (paragraph 4 of the complaint). The trust corpus consisting entirely of personal property was distributed to respondent pursuant to an order of the Probate Court of Montgomery County, Ohio dated May 11, 1940 (paragraph 7). Possession of the trust corpus was acquired by respondent in 1940 (paragraph 14). Petitioner applied to that probate court on October 9, 1957 for appointment as trustee, and that court entered an order on petitioner's application reciting that respondent had not theretofore sought appointment by that court as such fiduciary (paragraph 10). That court found that because respondent had at all times failed to seek such appointment, its actions in receiving the trust funds "were and are invalid" (paragraph 13). Petitioner claimed that pursuant to such appointment he was entitled to the custody and control of the trust corpus (paragraph 2).

The following additional facts appeared on the face of the complaint relating to the lack of capacity to sue defense: Petitioner was the sole plaintiff in the action (caption). The trust in question was one for the relief of animals (paragraph 4). Petitioner allegedly sought to enforce that trust by asking that the trust property be turned over to him and that respondent be ordered to render an accounting (prayer).

Petitioner's statement of the case attempts to bring cer-

tain matters before this Court which were not in petitioner's complaint. (1) The statement refers to an action commenced by respondent in an Indiana probate court. The complaint does not mention such action. (2) The statement incorporates by reference a purported written opinion of the Ohio probate court dated January 22, 1958 which is set forth commencing at Appendix page 13a. The complaint does not mention this opinion. (3) The statement incorporates by reference a purported order of the Ohio probate court dated February 4, 1958 which is set forth commencing at Appendix page 18a. Although the complaint refers to that order at paragraph 13, the order itself was not made a part of the complaint.

Even though their relevancy is very questionable, under these circumstances respondent assumes the first two of these matters will not be considered by this Court. It is further assumed the third will be considered only to the extent such order is referred to in the complaint.

III. ARGUMENT

1.

PETITIONER'S ALLEGED CLAIM ACCRUED IN 1940, EIGHTEEN YEARS BEFORE THE COMPLAINT WAS FILED.

Petitioner's action was brought in Indiana, therefore Indiana statutes of limitation governed. *Order of United Commercial Travelers of America v. Wolfe* (1947), 331 U. S. 586, 607, 67 S. Ct. 1355, 1365; Acts 1881 (Spec. Sess.) ch. 38, § 43, p. 240 (Burns' Indiana Statutes Annotated, § 2-606; 11 Am. Jur. 505).

Under the law of Indiana, "The statute of limitations begins to run at the time when a complete cause or right of action accrues or arises or when a person becomes liable to an action." *Merritt v. Economy Department Store, Inc.* (1955), 125 Ind. App. 560, 128 N. E. 2d 279, 281. It was obvious from the face of petitioner's complaint that he claimed his alleged cause of action arose because respondent failed to seek appointment as trustee in 1940. It was also obvious from the face of his complaint that if his position was correct, respondent became liable to an action for recovery of possession of the trust corpus and for an accounting at the same time. The statutes of limitation therefore commenced running against petitioner in 1940, eighteen years before the complaint was filed. Ohio law is in accord. *Squire v. Guardian Trust Co.* (1947), 79 Ohio App. 371, 72 N. E. 2d 137, 146. None of the applicable statutes of limitation exceeds fifteen years. Acts 1881 (Spec. Sess.), ch. 38, § 37, p. 240; 1951, ch. 301, § 1, p. 999; Burns' Indiana Statutes Annotated, § 2-601. Acts 1881 (Spec.

Sess.), ch. 38, § 39, p. 240; Burns' Indiana Statutes Annotated, § 2-603.

Because petitioner's alleged claim accrued in 1940, all possible applicable statutes of limitation had expired in 1955, three years before the complaint was filed. Both the District Court and the Court of Appeals properly held it was filed too late.

2.

THE STATUTES OF LIMITATION COMMENCED RUNNING IN 1940 WHEN, ACCORDING TO PETITIONER'S THEORY OF THE CASE, RESPONDENT'S POSSESSION OF THE PROPERTY WAS WRONGFUL.

The complaint alleged that respondent "acquired possession of said trust property in 1940" (paragraph 14) and that "At all times since receiving possession of the aforesaid trust property (respondent) has purported to deal with it" contrary to Ohio law concerning issuance of letters of appointment (paragraph 9). Petitioner thus took the position that respondent's execution of the trust was contrary to Ohio law since 1940. If so, respondent's conduct was unlawful at all times since 1940, and it must necessarily have followed that respondent's possession of the trust corpus was unlawful at all times from that time. In fact the Ohio order relied upon by petitioner recited that respondent's actions in receiving the trust funds "were and are invalid."

It is the law that statutes of limitation commence running when possession of property is wrongful, not at a later date when a party obtains a court order permitting that party to attempt to effect recovery of the property. *Albers v. Continental Illinois Bank & Trust Co., et al.* (1938), 296

Ill. App. 592, 17 N. E. 2d 66, 67. Petitioner's action here consequently accrued in 1940 when (if petitioner's position was correct) respondent's possession of the trust corpus became wrongful. Petitioner's action, if he had one, arose at once even though he was not appointed until later. Consequently the District Court and the Court of Appeals correctly held his action was barred.

3.

PETITIONER COULD NOT INDEFINITELY SUSPEND THE STATUTES OF LIMITATION BY DELAYING HIS OWN PERFORMANCE. THEREFORE THE STATUTES HAD RUN BEFORE HIS SUIT WAS FILED.

One of the two grounds upon which both the District Court and the Court of Appeals decided this case was the rule that a plaintiff cannot indefinitely suspend statutes of limitations by delaying his own performance. The District Court held that "If the delay was due to the action or inaction of the complaining party, the statute will not be stayed." The Court of Appeals held that "A plaintiff cannot indefinitely suspend the statute of limitations by delaying action." Unquestionably this is the law. *Bapst v. Am. Adm'r. v. Blaut* (1893), 147 U. S. 647, 651-652, 657, 660-661, 37 L. ed. 316, 13 S. Ct. 466; *High et al. v. Board of Commissioners of Shelby County* (1883), 92 Ind. 580, 587-588; *Hitchcock v. Cosper* (1905), 164 Ind. 633; *Grossard v. Grossard* (1945, CCA-10), 149 F. 2d 111, 112; *Dean v. Iowa-Des Moines National Bank & Trust Co.* (1940), 227 Iowa 1239, 290 N. W. 664, 128 A. L. R. 137; and 34 Am. Jur. 96.

The applicability of the rule of law stated in these cases to the facts in the case at bar is apparent. Petitioner here need only have obtained his purported appointment by the

Ohio probate court to perfect his alleged cause of action. He failed to do so from 1940 when he could have done so until 1957. Surely the District Court and the Court of Appeals correctly held that his own delay in performance did not suspend the statutes of limitation with the consequence that his action was filed too late.

4.

THE STATUTES OF LIMITATION RAN BEFORE PETITIONER'S ACTION WAS FILED BECAUSE OF PETITIONER'S UNQUESTIONED FAILURE TO MAKE DEMAND FOR RETURN OF THE PROPERTY WITHIN THE STATUTORY PERIODS.

The complaint alleges petitioner demanded surrender of the trust assets and an accounting from respondent after February 4, 1958. Petitioner has never contended that respondent's original possession of the trust corpus was unlawful. The complaint proceeded on both a replevin and an accounting theory. It is unquestionably the law that when property is lawfully in the possession of another, replevin will not lie until demand for delivery has been made. *Hays et al. v. Burns* (1939), 106 Ind. App. 374, 19 N. E. 2d 862, 863; *Butler v. Wolf Sussman, Inc.* (1943), 221 Ind. 50, 46 N. E. 2d 243, 244. It is also the law that demand is necessary in a suit for an accounting. *Lester v. Hinkle* (1923), 193 Ind. 605, 613.

The second of the two grounds upon which both the District Court and the Court of Appeals decided this case was the rule that if a demand is required, it must be made within the period of the statutes of limitation. The District Court held that "There must, however, be a limit to the time within which a demand must be made. It must be

made within a reasonable time [which], in the absence of circumstances justifying or excusing a longer delay is, according to the cases, the time limited by the statute for the commencement of the action." The Court of Appeals held that "If a demand must be made as a preliminary step, it must be made within a reasonable time, that is, within the period of the statute of limitations." This unquestionably is also the law. *Bauserman, Adm'r, v. Blunt* (1893), 147 U. S. 647, 657, 37 L. ed. 316, 13 S. Ct. 466; *High et al. v. Board of Commissioners of Shelby County* (1883), 92 Ind. 580, 587-588; *Newsom v. The Board of Commissioners of Bartholomew County* (1885), 103 Ind. 527, 530; *Gossard v. Gossard* (1945, CCA-10), 149 F. 2d 111, 112-113; and 34 Am. Jur. 98.

According to the face of the complaint, petitioner's demand here was not made until eighteen years after it could have been made by petitioner, therefore the statutes of limitation had run before his complaint was filed.

5.

PETITIONER DID NOT HAVE CAPACITY TO SUE.

The trust here in question was one for the relief of animals, therefore it was a charitable trust. Scott, *The Law of Trusts, Second Edition* (1956), § 374.2. The law of both Indiana and Ohio is that only the Attorney General may sue to enforce a charitable trust. *Boice v. Mallers et al.* (1950), 121 Ind. App. 210, 96 N. E. 2d 342, 344-345, transfer to Supreme Court of Indiana denied 229 Ind. 325, 98 N. E. 2d 368, *Kemper v. Lane Seminary*, 17 Ohio 293, 328-329.

Petitioner was not the Attorney General, consequently under these authorities he lacked the capacity to maintain this action for enforcement of a charitable trust.

6.

THE DECISION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH OHIO LAW.

Petitioner apparently argues the Court of Appeals decision conflicts with Ohio statutes relating to the administration of decedents' estates. This argument misapprehends the holding of that Court. Although respondent maintains under these circumstances it was not required to comply with these Ohio statutes, for the purpose of the motion to dismiss both respondent and the Court of Appeals have considered this question irrelevant. The relevant question instead, according to the Court of Appeals, was whether petitioner filed his action in time regardless of whether respondent was required to comply with the Ohio statutes. The Court of Appeals held simply that petitioner had *not* filed his action in time for the reasons that (1) he could not indefinitely suspend the statutes of limitation by delaying his own performance and (2) he did not make requisite demands within the period of the statutes of limitation.

Petitioner has cited no Ohio case or Ohio statute either to this Court or the Court of Appeals which is contrary to these two widely-accepted rules of common law. There simply is no conflict between the Court of Appeals decision and Ohio law.

7.

THE DECISION OF THE COURT OF APPEALS DID NOT DENY FULL FAITH AND CREDIT TO OHIO JUDICIAL PROCEEDINGS

Petitioner's argument that the Court of Appeals decision denied full faith and credit to Ohio judicial proceedings

again mistakes the basis of the Court of Appeals opinion. The Court of Appeals simply applied the statutes of limitation of the forum, Indiana, to petitioner's claimed Ohio substantive right.

This Court held in the case of *Wells v. Simonds Abrasive Co.* (1953), 345 U. S. 514, 516, 73 S. Ct. 856, 857 that "Long ago, we held that applying the statute of limitations of the forum to a foreign substantive right did not deny full faith and credit (citing cases)."

Petitioner contends in connection with his full faith and credit argument that he as purported trustee acted on behalf of the State of Ohio, therefore statutes of limitation could not run against him. This argument is supported neither by reason nor by authority. If it were valid, it would lead to the absurd conclusion that statutes of limitation never could run against any court-appointed fiduciary and that such fiduciaries would have governmental immunity from suit in many jurisdictions. Patently the law is to the contrary.

8.

EVEN SHOULD THIS COURT DECIDE ANY OF THE QUESTIONS PRESENTED ADVERSELY TO RESPONDENT, THERE ARE NO SPECIAL AND IMPORTANT REASONS WHICH SUGGEST SUCH QUESTIONS SHOULD BE DECIDED BY THIS COURT.

Rule 19 of this Court provides in part that writ of certiorari will be granted only where there are "special and important reasons therefor." The character of reasons for granting the writ are outlined, and the only one which can apply here is that the Court of Appeals "has decided an important state or territorial question in a way in

conflict with applicable state or territorial law." Respondent has pointed out above that no question of state law, whether important or unimportant, has been decided which in any way conflicts with applicable Ohio law.

Are there special and important reasons for granting the writ here? In order for the questions here presented to arise again, each of the following facts would have to occur: (1) decedent dies subject to the probate laws of Ohio, (2) a fiduciary in charge of some of decedent's property fails to comply with the Ohio law concerning obtaining letters of appointment, (3) the fiduciary removes some of such property from the state, (4) a third person obtains letters of appointment, and (5) such third person files suit outside Ohio after the statutes of limitation of the forum have run in an attempt to recover such property. The possibility that such a chain of events will occur in the future is very, very slight. Under these circumstances, respondent respectfully and earnestly submits there are no special and important reasons for granting the writ.

This Court has heretofore held that certiorari jurisdiction is "to be exercised sparingly, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decisions." *Hamilton-Brown Shoe Company v. Wolf Brothers & Co.* (1915), 240 U. S. 251, 60 L. ed. 629, 633. It has also been held that the writ should be used "to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort." *Magnum Import Co. v. Coty* (1922), 262 U. S. 159, 163, 67 L. ed. 922, 924. Surely the questions presented here do not meet the test prescribed by these cases.

Certainly common sense and equitable principles indicate a proper result has been reached here. At any time

after 1940 if petitioner's position is correct, petitioner could have obtained his purported appointment and filed suit. If petitioner's argument that he could wait until his purported appointment before the statutes commenced running was correct, he could have waited one hundred seventeen years instead of seventeen years before filing suit. To suppose that petitioner could have indefinitely suspended the statutes of limitation by delaying his own performance is contrary to common sense and is contrary to good conscience.

Not only would the purpose of statutes of limitation as statutes of repose have been thwarted had petitioner's argument been accepted, indeed, the purpose of the trust set up in the Mary Powell Crume will would have been thwarted. Although she named respondent, not petitioner, testamentary trustee for the benefit of animals coming under the care of respondent, not under the care of petitioner, and although petitioner has never contended that respondent has failed to carry out the trust purpose, petitioner would have had the District Court order respondent to deliver the trust corpus to petitioner who was not even named in the will. Petitioner's position was and is decidedly contrary to common sense and contrary to good conscience.

IV. CONCLUSION

1. The Court of Appeals held simply that petitioner had not filed his action in time for the reasons that (1) he could not indefinitely suspend the statutes of limitation by delaying his own performance and (2) he did not make requisite demands within the period of the statutes of limitation. That holding was in accordance with applicable rules of law, common sense and equitable principles.

2. The Court of Appeals decision is not in conflict with Ohio law. Undoubtedly Ohio would follow the two widely-accepted rules of common law stated in the preceding paragraph.

3. The Court of Appeals decision did not deny full faith and credit to Ohio judicial proceedings because that decision simply applied the statutes of limitation of the forum to petitioner's claimed substantive right.

4. There are no special and important reasons which suggest any of the questions presented here should be decided by this Court.

On the basis of the foregoing reasons and authorities, respondent most respectfully and most earnestly submits the petition for writ of certiorari is not meritorious and should not be granted.

Respectfully submitted,

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